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No.

IN THE
SUPREME COURT OF THE UNITED STATES

The Coalition for the Fair and Equitable Regulation of Docks On the Lake of the Ozarks,

Petitioners,

v.

The Federal Energy Regulatory Commission
and
Union Electric Company, d/b/a AmerenUE

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can The Federal Energy Regulatory Commission issue a regulation and thereby delegate to a private entity the power to exact a tax?

2. Can FERC set its own rules of procedure to override the mandated provisions of procedure set by Congress in 16 U.S.C. § 825(f) and to, thereby, deny due process of law?

PARTIES TO THE PROCEEDING

Petitioner

The Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks

An group of riparian land owners around the Lake of the Ozarks.

Respondents

The Federal Energy Regulatory Commission
and
Union Electric Company, d/b/a AmerenUE

The Federal Energy Regulatory Commission is an agency of the United States government. The Union Electric Company, d/b/a AmerenUE is a licensee operating a electric utility. It is publicly traded. Petitioner is not aware of any entity owning more than 10% of its publicly owned stock.

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Petitioner respectfully petitions for a Writ of Certiorari to review the decision of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The July 24, 2002, opinion for the United States Court of Appeals for the Eighth Circuit is reported at 297 F.3d 771. A copy of the Opinion is included in the Appendix ("App.") hereto at App. p. 1. The November 13, 2000, Opinion of The Federal Regulatory Commission's Order Denying Rehearing and Stay is reported at 93 FERC P 61,158. A copy of the Opinion is included in the App. hereto at App. p. 43. The March 16, 2000, Opinion of The Federal Regulatory Commission's Order on Complaint is reported at 90 FERC P 61,249 . A copy of the Opinion is included in the App. hereto at App. p. 21.

JURISDICTION

Petitioners filed a Petition for Rehearing and Petition for Rehearing En Banc denied on October 17, 2002 (App. p. 43). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

A. Article I, §8, clause 1 of the Constitution states it is the Congress that has the "Power to lay and collect Taxes".

B. U.S. Const., Fifth Amendment which provides, in part: "No person shall....be deprived of life, liberty, or property, without due process of law"

C. 12 U.S.C. §8251. (App. p. 44).

D. 16 U.S.C. § 797(e) (2000). (App. p. 47).

E. 16 U.S.C. § 825(f) (2000). (App. p. 52).

F. 31 U.S.C. § 9701. (App. p. 56).

G. 33 U.S.C. § 565. (App. p. 58).

STATEMENT OF THE CASE

The Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks petitioned for review of a Federal Energy Regulatory Commission decision denying its challenge to that which has been called by the Defendants to be "user fees" assessed on docks at the Lake. The Lake is part of a hydropower project on the Osage River that is owned and operated by Intervenor Union Electric Company under a license from FERC. The license attempts to authorize Union Electric to allow certain uses of the Lake for the benefit of the public and to recoup its "costs" of doing so, subject to oversight by FERC. Union Electric established a program requiring owners of docks extending into the Lake to obtain permits for the docks and to pay what it has called "user fees." The Coalition, a group of lake-front property owners, filed a complaint with FERC contending that FERC could not delegate to Union Electric the power to impose these "fees"; that the "fees" constituted an illegal tax or toll; that FERC should order discovery and a hearing on the Coalition's complaint; and that the "fees" were unreasonable. FERC denied the Coalition's complaint and its request for rehearing. The Coalition then petitioned the Court of Appeals for review of FERC's decision, reiterating the arguments it made before FERC. The Eighth Circuit denied review

REASONS FOR GRANTING THE WRIT

I. The Federal Energy Regulatory Commission has issued an unlawful regulation and unlawfully authorized a private entity to exact a tax.

SUMMARY: Congress has the sole power to levy taxes. *National Cable Television Association, Inc. v. United States*, 415 U.S. 336, 340 (1974). Even agencies are only authorized to charge a fee for services and "normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, that is not shared by other members of society." *Id.* at 340-341. Three important points come from *National Cable*. First, the authorized fee must be charged by an agency, not a private entity. Second, the fee must be based on the actual cost of the government, not the public policy or interest served. Third, an agency must clearly distinguish between the benefit the individual receives because of the license as opposed to the benefit to the industry at large or the public at large. See also *Yosemite Park and Curry Co. v. United States*, 625 F.2d 925, 931 (Cl. Ct. 1982). The Decision of the Eighth Circuit is contrary to *National Cable* and has allowed a governmental agency (FERC) to authorize a private entity to levy a tax.

GENERAL BACKGROUND: The Federal Water Power Act of 1920 authorizes FERC to issue licenses to build hydropower projects on navigable waters of the United States. 16 U.S.C. § 797(e) (2000). Congress later amended the Act to include that the building of these hydropower projects should ensure "... the protection of recreational opportunities and the preservation of other aspects of environmental quality." *Id.* (as amended by Pub. L. No. 99-495, § 3(a) (1986)). FERC has adopted a regulation that states: "The Commission will not object to licensees and

operators of recreational facilities within the boundaries of the project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating and maintaining such facilities." 18 C.F.R. § 2.7.

Article 41 of Union Electric's license for the Osage Project allows Union Electric to grant permission for certain uses of the project lands and waters without prior Commission approval, if the use is "consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project." That authority, however, comes with the concomitant responsibility to "supervise and control the uses and occupancies for which [Union Electric] grants permission." Under subsection b of Article 41, Union Electric can allow such uses as "non-commercial piers, landings, boat docks, or similar structures and facilities." At the same time, Union Electric is charged with the responsibility of making sure that any such structures are of suitable design and are well-maintained. The license provides: "To implement this paragraph (b), *the Licensee may*, among other things, *establish a program for issuing permits* for the specified types of use and occupancy of project lands and waters, *which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program.*" (emphasis added).

FIRST, while the Court of Appeals is to accord substantial deference to an agency's interpretation of its own regulations, that interpretation cannot violate the Federal Constitution or a federal statute. *University of Iowa Hospitals and Clinics v. Shalala*, 180 F.3d 943, 950 (8th Cir. 1999). Congress has not authorized FERC to allow licensees of hydropower project waters to charge fees to private individuals. FERC's regulation is in direct contradiction of 33 U.S.C. § 565, which prohibits the charge of a toll on

improvements to navigable rivers by private individuals. Neither the Eighth Circuit Court of Appeals nor FERC has pointed to any legislative authority authorizing delegation of either regulatory fee or taxation authority to a private corporation of which the Commission is charged with regulating. (See 297 F.3d at 778-779). The Eighth Circuit Court of Appeals inability to point to a single case supporting the proposition that a federal agency may delegate regulatory and taxing authority is unsupported by the Constitution as well as statutory authority.

Delegation under Congress' taxing power is subject to greater scrutiny than applied to other nondelegation challenges. *Skinner v. Mid-America Pipeline Company*, 490 U.S. 212, 218, 109 S.Ct. 1726, 1732 (1989). In order to delegate its taxing authority Congress must clearly indicate "its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as "fees" or "taxes," on those parties." *Skinner*, 490 U.S. 224, 109 S.Ct. 1734 (citing *FEA v. Algonquin SNG, Inc,* 426 U.S. 548, 560, 96 S.Ct. 2295, 2302 (1976)). In the current instance there is nothing to indicate Congress' intention to delegate to FERC the power to delegate its authority to impose "fees" as a federal agency to third parties.

SECOND, for the same reasons, the decision violates *National Cable* in that, as noted above, the assessment of the fee must be based on the actual cost of the government, not the public policy or interest served. Here there is ***no*** cost to the government as there is ***no*** cost to FERC, but only cost to a private entity. Neither the Eighth Circuit Court of Appeals nor FERC has pointed to any authority that allows a governmental agency authority to authorize a private entity to assess "fees" or "taxes" to recoup costs that are not even born

by the governmental agency. Further, as Union Electric is not an agency, this regulatory scheme allows the agency and its licensee to avoid the strictures of the Independent Offices Appropriations Act of 1952 ("IOAA") which authorizes federal agencies to charge for a service or thing of value provided by the agency. See *Federal Power Commission v. New England Power Company*, 415 U.S. 345, 350, 94 S. Ct. 1151, 1154 (1974). Under the IOAA each charge shall be (1) fair; (2) based on; (a) the cost to the government; (b) the value of the service or thing to the recipient; (c) public policy or interest served; and (d) other relevant factors. 31 U.S.C. § 9701. This statute is the cornerstone for an agency charged fee. Yet, under the regulatory scheme adopted by FERC and approved by the Eighth Circuit, the fees allowed by this agency and possible to be allowed by other agencies, will escape from this statutory control.

THIRD, the "user fee" charged by Union Electric is a tax because the fee does not directly correlate with the benefit conferred upon the dock owners. While the Eighth Circuit and FERC attempt to justify these charges by referring to them as "costs of administering the permit program" (297 F.3d at 776), it is also acknowledged that the "user fee" imposed on the Coalition include those costs which are the licensees' "*expenditures for property management, permit processing, and enforcement; derelict dock removal; and lake survey.*" (297 F.3d at 776 and 780-781). The Eighth Circuit decision accordingly directly conflicts with *National Cable*. The charge of the permit "user fee" does not confer upon dock owners any special benefit or privilege and "no charge should be made for services when identification of the ultimate beneficiary is obscure and services primarily benefit broadly the general public." *Federal Power Commission v. New England Power Company*, 415 U.S. 345, 350, 94 S. Ct. 1151, 1154 (1974); 31 U.S.C. § 483a. To constitute a fee the charge should be

specific for specific services to specific individuals or companies. *Id.* Furthermore, the "value to the recipient is the measure of the authorized fee." *National Cable Television*, 415 U.S. at 343, 94 S.Ct. at 1150. In this instance, the "fee" imposed by Union Electric is not specific. The "fee" includes several expenses (e.g. property management, derelict dock removal, lake survey) that are not directly targeted to any individual benefit conferred upon dock owners. Included are some expenses that Union Electric would incur managing the project waters for its hydropower project irrespective of the docks being present (e.g. property management, lake survey). As a result, the permit "fee" charged by Union Electric is an unlawful tax for the use of public waterways. Review by this Court is needed on this important issue as to agency delegation to private entities of collection of taxes or fees.

II. The Eighth Circuit has allowed the delegation by Congress to FERC to set its own rules of procedure to override the mandated provisions of procedure set by Congress in 16 U.S.C. § 825(f) and to, thereby, deny due process of law.

SUMMARY: The Congress has mandated in 16 U.S.C. § 825(f) (2000) that subpoena power as well as deposition power, be provided to any party in a proceeding or investigation pending before FERC. The section admits of NO limitations. Yet, FERC determined in its processing of the complaint in this case, to determine the facts and issues from letters and other information submitted. It did not allow the Coalition to develop a record by the use of depositions and subpoenas. It then decided the case without a hearing. The Court of Appeals recognized the Coalition had asserted its rights under 16 U.S.C. §825(f) to have subpoena and deposition power. *The Coalition for the Fair and Equitable Regulation of Docks On the Lake of the Ozarks v. The*

Federal Energy Regulatory Commission, 297 F.3d. 771, 779-780. The Court of Appeals, however, rejects the Coalition's position. It first correctly states that the question of whether the fee is allowable is primarily a legal issue. *Id.* The Coalition cannot disagree with that legal proposition. Yet, the Court of Appeals then goes on to recognize that the reasonableness of the fee is a factual issue. *Id.* But it rejects the position of the Coalition as the fees generated were allegedly less than the expenses allegedly associated with allowing the docks on the lake. *Id.* No explanation is given as to how this factual determination can be reached on evidence that has not been adduced through the mandated procedure of allowance of discovery, subpoenas and depositions.

LAW: "Where questions of due process and sufficiency of evidence are raised on appeal from an agency's final decision, the court must review the agency's decision-making process and conduct a plenary review of facts underlying the challenged action. It must find substantial evidence to support the agency's action and may affirm the agency action, if at all, only on the grounds articulated by the agency." *Olenhouse v. Commodity Credit Corporation*, 42 F.3d 1560, 1565 (10th Cir. 1994). In reviewing an agency's explanation for particular action, the court must conduct an inquiry under the "arbitrary or capricious" standard to determine whether the agency considered "all relevant data and articulated a rational connection between the facts found and the decision made." *Id.* at 1574 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866 (1983)). Further, an agency decision will be set aside "if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be

ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. at 2867. In addition the Court of Appeals examines agency factual findings under the "substantial evidence" standard of review. *Escudero-Corona v. Immigration and Naturalization Service*, 244 F.3d 608, 612 (8th Cir. 2001).

APPLICATION TO FACTS: Without any opportunity by the Coalition to inquire of the licensee holding all of the information necessary for proper determination of the issues presented, a determination by the Commission as to whether or not any facts are in dispute is untenable. Here, FERC has justified its decision without ever being given any information in accordance with 18 C.F.R. §325.213, which requires the submission of any documents, contracts, affidavits or testimony when the facts are in dispute. Instead it bases its decision on information provided by Union Electric counsel.

Furthermore, the decision by FERC was originally entered because FERC found it possible to assess the reasonableness of Union Electric's fees on the existing record. Yet, at the end of its decision FERC makes this statement: "while Ameren UE's [Union Electric's] submission does not constitute proof of truthfulness or the accuracies of these expenses, we do not assume that a licensee is furnishing false or misleading information to the Commission. Nor do we require an evidentiary hearing to verify the accuracy of all information that licensee furnishes on request." As such, despite acknowledging Union Electric's submission does not constitute proof of the truthfulness or the accuracies of the expenses, the Eighth Circuit determines that the submission constitutes "substantial evidence" supporting FERC's decision. The statements are directly contradictory and do not support the decision is based on substantial evidence.

In the case of *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 this Court stated:

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witness.***(citing authorities). What we said in *Greene v. McElroy*, 360 U.S. 474, 496-97, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377, (1959), is particularly pertinent here:
>
> "'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on findings of fact, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or, who in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment* * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.' * * *'"

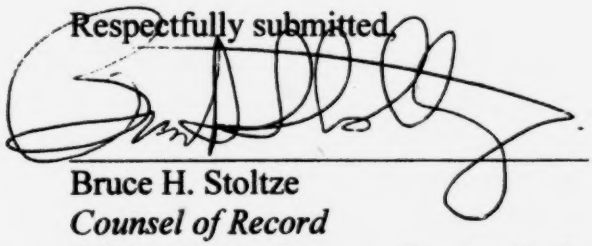
The Coalition has done all it can in an attempt to obtain due process at law in this case. It filed a complaint

with the agency. It sought to obtain discovery, which was its right under 16 U.S.C. § 825(f). FERC denied that request of the Coalition. The Coalition objected to FERC then deciding the issues of fact without allowing due process of law and proper discovery. FERC continued to ignore the Coalition's legitimate requests. The Coalition appealed this issue to the Eighth Circuit. The Eighth Circuit has allowed the decision of FERC to continue unchecked. FERC has now been advised its summary procedure which denies to complaining parties the ability to obtain information to process its case, is acceptable. Review by this Court is needed for this important issue of agency procedural due process.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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The COALITION FOR FAIR AND EQUITABLE REGULATION OF DOCKS ON LAKE OF THE OZARKS,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.
Union Electric Company, doing business as AmerenUE,
Intervenor--Intervenor on
Appeal.

No. 01-1071.

Submitted: Nov. 14, 2001.
Filed: July 24, 2002.

Group of lakefront property owners petitioned for judicial review of decision in which Federal Energy Regulatory Commission (FERC) denied group's challenge to user fees assessed on docks extending into lake that was part of hydropower project owned and operated by electric utility pursuant to license issued by FERC. The Court of Appeals, John R. Gibson, Circuit Judge, held that: (1) FERC had power, under Federal Power Act, to regulate use of hydropower project lands by others besides licensee; (2) fees imposed on dock owners by utility could not be characterized as a tax; (3) license did not violate non-delegation doctrine; (4) distinction drawn by utility in imposing dock fees on owners did not violate equal protection; (5) denial of hearing was within FERC's discretion and did not violate property owners' due process rights; and (6) determination that fees generated were less than utility's allowable expenses for administering permit program was supported by substantial evidence.

Petition for review denied.

West Headnotes

[1] **Electricity** 10
145k10 Most Cited Cases

Arguments that were not raised in rehearing application before Federal Energy Regulatory Commission (FERC) were not reviewable by Court of Appeals, but equal protection contention that arguably was raised by petitioner's use of word "discriminatory" would be reviewed. U.S.C.A. Const.Amend. 5; Federal Power Act, § 313(b), as amended, 16 U.S.C.A. § 825l(b).

[2] **Electricity** 1
145k1 Most Cited Cases

Federal Energy Regulatory Commission's (FERC) interpretation of the Federal Power Act, the statutory scheme it is charged with administering, is entitled to considerable weight under *Chevron* principles governing judicial review of agency decisions. Federal Power Act, § § 1 et seq., 321, as amended, 16 U.S.C.A. § § 792 et seq., 791a.

[3] **Statutes** 219(1)
361k219(1) Most Cited Cases

[3] **Statutes** 219(4)
361k219(4) Most Cited Cases

Reviewing court will defer to an agency's interpretation of a statute it is charged with administering if that interpretation is consistent with the plain meaning of the statute or is a permissible construction of an ambiguous statute.

[4] **Administrative Law and Procedure** 413
15Ak413 Most Cited Cases

Reviewing court will accord substantial deference to an agency's interpretation of its own regulation, which court is bound to uphold unless it violates the Constitution or a federal statute, or unless the interpretation is plainly erroneous or inconsistent with the regulation.

[5] **Administrative Law and Procedure** 783
15Ak783 Most Cited Cases

On review of agency decision, court reviews constitutional questions de novo.

[6] **Electricity** 10
145k10 Most Cited Cases

Federal Energy Regulatory Commission (FERC) had power, under Federal Power Act, to regulate use of hydropower project lands by others besides licensee. Federal Power Act, §§ 4(e), 6, 10(a)(1), (g), 309, as amended, 16 U.S.C.A. §§ 797(e), 799, 803(a)(1), (g), 825h; 18 C.F.R. § 2.7.

[7] **Electricity** 10
145k10 Most Cited Cases

In the context of authority of Federal Energy Regulatory Commission (FERC) to regulate public's use of hydropower project lands, a "tax" is a general charge not correlated to a particular benefit, whereas a "fee" is a charge exacted in exchange for a benefit of which the payor has voluntarily availed itself, and may properly be based on the cost of providing a benefit to the recipient.

[8] **Electricity** 10
145k10 Most Cited Cases

Fees which were imposed upon dock owners by electric utility, pursuant to license issued by Federal Energy Regulatory Commission (FERC), as a result of owners' choice to avail themselves of privilege of having dock on property belonging to hydropower project, and which subsidized permit program that benefited dock owners, could not be characterized as a tax.

[9] **Electricity** 10
145k10 Most Cited Cases

License under which electric utility owned and operated hydropower project did not violate non-delegation doctrine, given that statute guided Federal Energy Regulatory Commission's (FERC) administration of hydropower projects by requiring FERC to ensure that project was adapted to comprehensive plan for developing waterways for benefit of interstate and foreign commerce, using and improving water-power development, adequately protecting and enhancing fish and wildlife, and for other beneficial public uses, and FERC retained authority to require modification of project and its plans and specifications to accomplish outlined goals. Federal Power Act, § 10(a)(1), as amended, 16 U.S.C.A. § 803(a)(1).

[10] **Constitutional Law** 209
92k209 Most Cited Cases

Fifth Amendment equal protection claims are analyzed in the same way as equal protection claims brought under the Fourteenth Amendment. U.S.C.A. Const.Amends. 5, 14.

[11] **Constitutional Law** 213.1(2)

92k213.1(2) Most Cited Cases

If a classification does not burden a fundamental right or target a suspect class, it will be upheld on equal protection challenge if it bears a rational relationship to a legitimate end. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 234.6
92k234.6 Most Cited Cases

[12] Electricity 10
145k10 Most Cited Cases

Distinction drawn by hydropower project licensee in imposing fees on owners of docks extending onto project property, based on dock size, satisfied rational basis test under equal protection principles, inasmuch as expenses that licensee sought to recoup included inspection expenses, and it was rational to expect that licensee would incur greater expenses in connection with larger structures, and that owners of larger structures would enjoy greater benefits from being allowed to use project lands for their docks. U.S.C.A. Const.Amend. 5.

[13] Constitutional Law 297
92k297 Most Cited Cases

[13] Electricity 10
145k10 Most Cited Cases

Decision by Federal Energy Regulatory Commission (FERC), in response to complaint challenging user fees assessed by electric utility on property owners' docks extending onto hydropower project property, to deny a hearing on the ground that there were no material factual disputes was within FERC's discretion and did not violate

property owners' due process rights, given that owners' primary challenge was legal issue of whether FERC was authorized to allow utility to impose disputed fees, and owners gave FERC no reason to doubt accuracy of information provided by utility with respect to related issue of reasonableness of those fees. U.S.C.A. Const.Amend. 5; Federal Power Act, § § 307, 308, as amended, 16 U.S.C.A. § § 825f, 825g; 18 C.F.R. § 385.206(g)(2).

[14] Administrative Law and Procedure 🔑**324**
15Ak324 Most Cited Cases

The formulation of administrative procedures is basically to be left within the discretion of the agencies.

[15] Electricity 🔑**10**
145k10 Most Cited Cases

Substantial evidence supported determination by Federal Energy Regulatory Commission (FERC) that fees generated were less than electric utility's allowable expenses for administering permit program under which property owners were allowed to construct docks on hydropower project property, given that expenses exceeded fees generated even if challenged labor costs were reduced.

***774** Bruce H. Stoltze, argued, Des Moines, IA (Steven P. Brick, on the brief), for appellant.

Robert H. Solomon, argued, Washington, DC (Kevin P. Madden, Dennis Lane and Judith A. Albert, on the brief), for appellee.

John R. Molm, argued, Washington, DC (Charles A. Zdebski and Ann E. Buckley, on the brief), for intervenor.

Before: BOWMAN, JOHN R. GIBSON, and STAHL, [FN1] Circuit Judges.

FN1. The Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

JOHN R. GIBSON, Circuit Judge.

The Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks petitions for review of a Federal Energy Regulatory Commission decision denying its challenge to user fees assessed on docks at the Lake. The Lake is part of a hydropower project on the Osage River that is owned and operated by Intervenor Union Electric Company under a license from FERC that authorizes Union Electric to allow certain uses of the Lake for the benefit of the public and to recoup its costs of doing so, subject to oversight by FERC. Union Electric established a program requiring owners of docks extending into the Lake to obtain permits for the docks and to pay user fees. The Coalition, a group of lake-front property owners, filed a complaint with FERC contending that FERC could not delegate to Union Electric the power to impose the fees; that the fees constituted an illegal tax or toll; that FERC should order discovery and a hearing on the Coalition's complaint; and that the fees were unreasonable. FERC denied the Coalition's complaint and its request for rehearing. The Coalition now petitions for review of FERC's decision, reiterating the arguments it made before FERC as well as some additional ones. We deny review.

The Federal Water Power Act of 1920 authorized the Federal Power Commission (now the Federal Energy Regulatory Commission) to issue licenses to public or private licensees

to build hydropower projects on navigable waters of the United States. 16 U.S.C. § 797(e) (2000). The Water Power Act was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.
First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n, 328 U.S. 152, 180, 66 S.Ct. 906, 90 L.Ed. 1143 (1946). Congress later added the requirement that FERC, in considering whether to license a project, take into account not only the "power and development ***775** purposes for which licenses are issued," but also "the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), *the protection of recreational opportunities,* and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e) (as amended by Pub.L. No. 99-495, § 3(a) (1986)) (emphasis added).

To promote recreational use of hydropower projects, FERC has adopted a regulation placing responsibility on project licensees to develop their project's recreational resources and permitting licensees to recruit the help of public agencies and private interests in this endeavor. 18 C.F.R. § 2.7 (2001). Specifically, the regulation states: "The Commission will not object to licensees and operators of recreational facilities within the boundaries of a project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating, and maintaining such facilities." *Id.*

Article 41 of Union Electric's license for the Osage Project allows Union Electric to grant permission for certain uses of

the project lands and waters without prior Commission approval, if the use is "consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project." That authority, however, comes with the concomitant responsibility to "supervise and control the uses and occupancies for which [Union Electric] grants permission." Under subsection b of Article 41, Union Electric can allow such uses as "non-commercial piers, landings, boat docks, or similar structures and facilities." At the same time, Union Electric is charged with the responsibility of making sure that any such structures are of suitable design and are well-maintained. The license provides: "To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program." FERC reserved the right to require Union Electric to file its standards, guidelines, and procedures for implementing the land-use article, and FERC also retained the right to require modifications of these instruments.

Pursuant to Article 41, after public notice and comment, Union Electric adopted permit requirements for use and occupancy of project land and waters. Anyone desiring to build or modify structures, including docks, on project property, was required to apply for a permit. Effective January 1, 1999, Union Electric adopted two "User fees," one covering all permits for new docks and modifications to existing docks, and the other being a user fee applicable to docks occupying more than 3000 square feet of water space. The fee for new construction and modification was set at a single payment of $400 for docks of between 1800 and 3000 square feet and $250 for docks less than 1800 square feet. For docks larger than 3000 square feet, the fee was a

recurring annual fee of $.045 per square foot. Union Electric's permit instructions stated: "Total fees collected by [Union Electric] will be applied to [Union Electric's] shoreline management costs at the Lake of the Ozarks."

The Coalition wrote FERC, asking it to rule that FERC itself had no authority to allow Union Electric to charge dock user fees at all because they amounted to a "tax for the use of public waterways," and further, that the actual fees on the Osage project were unreasonable because they ***776** exceeded the cost of reviewing the permit applications and inspecting the docks.

The Director of FERC's division of Licensing and Compliance responded with a letter dated August 5, 1999, generally affirming that Union Electric was authorized under Article 41 of the Osage project license to charge a reasonable fee to cover costs of administering the permit program and concluding that Union Electric's costs of administering the permit program exceeded the fees it collected. The Director did, however, advise Union Electric that certain expenses it claimed--its shoreline cleaning, fish stocking, and mosquito spraying costs--were not properly includable as costs of administering the permitting program and therefore should not be supported by dock permit fees.

Not satisfied with the decision articulated in the Director's August 5 letter, the Coalition filed a complaint with FERC, which the agency denied. FERC first considered the argument that the Federal Power Act does not authorize FERC to impose user fees or to allow Union Electric to do so. FERC reviewed the Act, and found that Congress expressly contemplated the use of hydropower projects for recreational purposes and that Congress gave FERC "wide latitude and discretion in the performance of its licensing and regulatory functions." *Union Electric Co.*, 90 FERC 61, 249,

2000 WL 280769, at *3 (March 16, 2000) (citing 16 U.S.C. § 803(g) and quoting *Metro. Edison Co. v. Fed. Power Comm'n*, 169 F.2d 719, 723 (3d Cir.1948)). It is FERC's policy to encourage development of recreational facilities at licensed projects, and as part of that policy, to allow the licensee to recoup the resulting expenses. An example of this policy is found at 18 C.F.R. § 2.7: "The Commission will not object to licensees and operators of recreational facilities within the boundaries of a project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating, and maintaining such facilities." FERC concluded that Congress has granted it the power to issue the kind of license it granted to Union Electric and to permit Union Electric to recoup certain expenses through user fees. 2000 WL 280769, at *4-5.

The Coalition further argued that the user fees amounted to a tax, to which FERC responded that money charged in return for a benefit of which the beneficiary has voluntarily availed itself is not a tax, but a fee. FERC reasoned that Union Electric "is not taxing the private property of the dock owners, but imposing a fee for allowing the dock owners to extend their facilities onto project property." *Id.* at *6.

The Coalition argued that Article 41 of the license gave Union Electric authority to recover only the cost of issuing permits, but not any other shoreline management expenses. Putting aside the expenses the Director had already excluded (fish-stocking, mosquito-spraying, and adopt-a-shoreline programs), FERC concluded that the remaining categories of expenses claimed by Union Electric (property management, permit processing and enforcement, derelict dock removal, and lake survey expenses) were of the sort Union Electric could recoup as "cost[s] of administering the permit program." *Id.* at *7. Union Electric reported allowable expenses of $945,000 for 1999, whereas its projected fees

from the permit program would only come to $615,000. This shortfall led FERC to conclude that the permit program fees were not excessive. *Id.* at *8.

The Coalition also argued that the user fees were a toll, prohibited by 33 U.S.C. § 565 (2000). FERC rejected this characterization, since the money was not collected for navigating the river. *Id.* at *6.

***777** FERC also rejected the Coalition's argument that the permit program interfered with dock owners' property rights: "The permit program does not assess property owners for structures placed on their own property but for the privilege of extending their structures into the Lake of the Ozarks, which is project property." *Id.*

Because FERC found it possible to decide on the existing record the issues the Coalition raised, it declined to assign the matter to an administrative law judge for a hearing, as the Coalition requested. *Id.* at *8.

The Coalition sought rehearing. It contended that FERC had erred by refusing to order a formal evidentiary hearing. However, FERC reasoned that an agency has discretion to deny an evidentiary hearing where a dispute can be resolved on written submissions. *Union Electric Co.*, 93 FERC 61, 158, 2000 WL 1701202 (Nov. 13, 2000). FERC concluded that the Coalition had not raised any factual disputes that required an evidentiary hearing. The questions concerning FERC's authority to allow Union Electric to impose permit fees were legal ones, not dependent on the resolution of factual disputes. As for the propriety of the particular fees imposed, on rehearing FERC obtained from Union Electric a more detailed accounting for the expenses it claimed to be recouping through permit fees. After reviewing the detailed expense submissions, FERC concluded, "The types of

expenses that [Union Electric] has described seem to us, on the whole, to be related to the granting of permission to other entities or individuals to place structures on project lands or in the project reservoir, or otherwise to obtain uses or interests in the project lands and waters, and to the enforcement of the program established for granting these types of permission." *Id.* at *5. FERC determined that the Coalition had not shown that the permit program fees are discriminatory or unreasonable, and therefore it denied the request for rehearing. *Id.* at *6. The Coalition filed this petition for review.

[1] The Coalition raises five questions for review, some of which include subparts. As a threshold issue, FERC and Union Electric object to this court considering contentions that the Coalition failed to raise in its application for rehearing before FERC. The three arguments in question are the Coalition's contentions (1) that the Army Corps of Engineers, not FERC, has authority over the construction of docks on the Lake of the Ozarks; (2) that FERC's decision violates 16 U.S.C. § 821 and Missouri riparian rights; and (3) that the permit program violated the Coalition's constitutional right to equal protection of the laws. The Coalition concedes that only arguments raised in the rehearing application should be reviewable in this court under 16 U.S.C. § 8251 (b) (2000) (with exception for cases in which there was reasonable ground for failure to raise objection), but contends it raised the arguments adequately. However, the Coalition's brief does not show that it raised the first two arguments in any recognizable form and only arguably shows that it raised the equal protection argument by using the word "discriminatory." Therefore, we will decline to exercise jurisdiction over the arguments concerning the Army Corps of Engineers and state riparian rights, but will entertain the equal protection argument.

[2][3][4][5] FERC's findings of fact are conclusive if they are supported by substantial evidence. 16 U.S.C. § 8251 (b). As for legal questions, FERC's interpretation of the Federal Power Act, the statutory ***778** scheme it is charged with administering, is entitled to considerable weight under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We will defer to an agency's interpretation of such a statute if that interpretation is consistent with the plain meaning of the statute or is a permissible construction of an ambiguous statute. *See Escudero-Corona v. INS*, 244 F.3d 608, 613 (8th Cir.2001). Similarly, we accord substantial deference to an agency's interpretation of its own regulation, which we are bound to uphold unless it violates the Constitution or a federal statute, or unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Univ. of Iowa Hospitals and Clinics v. Shalala*, 180 F.3d 943, 950-51 (8th Cir.1999) (internal quotation marks omitted). However, we review de novo constitutional questions, such as the Coalition's equal protection and due process claims. *Escudero-Corona*, 244 F.3d at 614.

II.

[6] The Coalition's principal argument is that the Federal Power Act does not confer on FERC the power to regulate the use of project lands by anyone other than Union Electric, the licensee. This argument flies in the face of the Supreme Court's assessment in *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 180, 66 S.Ct. 906, 90 L.Ed. 1143 (1946), that Congress intended to enact "a complete scheme of national regulation, which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal,

restrictive, negative approach of the River and Harbors Acts and other federal laws previously enacted." The Act commands FERC to see to it that projects are developed to serve various public needs, including recreation. 16 U.S.C. § § 797(e), 803(a)(1). Congress gave FERC the means to accomplish its tasks through statutory provisions vesting FERC with power and discretion. *See* 16 U.S.C. § § 799, 803(g), and 825h; *Niagara Mohawk Power Corp. v. Fed. Power Comm'n,* 379 F.2d 153, 158-59 (D.C.Cir.1967). FERC has discharged its duty by adopting regulations encouraging licensees to develop recreational uses of the project lands, placing on them the responsibility to assure that such uses are consistent with federal law and policy, and allowing them to charge reasonable user fees to defray the costs they incur in constructing, operating, and maintaining recreational facilities. 18 C.F.R. § 2.7. Similarly, FERC's ruling in this case allows Union Electric to recoup expenses it incurs in making available project lands for recreational use. A holding that FERC could not take any action that would regulate the conduct of anyone other than the licensee, no matter how directly other persons' conduct might affect a hydro-power project, would deprive FERC of the power to effectuate the goals it was directed to accomplish and would negate the broad grants of power and discretion in the Federal Power Act. The Coalition's argument finds no support in the Federal Power Act or in cases interpreting it and we therefore reject it.

[7][8] As part of the argument that FERC has no authority to regulate the public's use of project lands, the Coalition briefly argues that the user fees are a tax, which can only be levied by Congress. A tax is a general charge not correlated to a particular benefit, whereas a fee is a charge exacted in exchange for a benefit of which the payor has voluntarily availed itself. *See Nat'l Cable Television Ass'n v. United States,* 415 U.S. 336, 340-41, 94 S.Ct. 1146, 39 L.Ed.2d 370

(1974). A fee ***779** may properly be based on the cost of providing a benefit to the recipient. *Neb. Trails Council v. Surface Transp. Bd.*, 120 F.3d 901, 905-07 (8th Cir.1997). The fees in this case were imposed as a result of the dock owners' choice to avail themselves of the privilege of having a dock on project land, and the fees subsidized a permit program that benefited the dock owners. There is no basis for characterizing the charges in this case as a tax.

III.

[9] The Coalition argues that Article 41 of the license violates the non- delegation doctrine of *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), because there is no intelligible statutory principle to which Union Electric is required to conform. To the contrary, 16 U.S.C. § 803(a)(1) (2000) guides FERC's administration of projects by requiring FERC to assure that the project be adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife ... and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title.

There is thus no grant of decision-making authority to FERC without an intelligible guiding principle. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Furthermore, FERC retains authority to require the modification of the project and its plans and specifications, to accomplish the outlined goals. 16 U.S.C. § 803(a)(1). Therefore, the license represents no real delegation of power to Union Electric, because FERC retains the right to

require modification of Union Electric's program. In fact, in this case, FERC reviewed the expenses Union Electric claimed and rejected some of those expenses as ineligible for recoupment.

IV.

[10][11][12] The Coalition challenges the permit program as a violation of its constitutional right to equal protection. Fifth Amendment equal protection claims are analyzed in the same way as equal protection claims brought under the Fourteenth Amendment. *United States v. McClinton*, 815 F.2d 1242, 1244 n. 3 (8th Cir.1987). If a classification does not burden a fundamental right or target a suspect class, it will be upheld if it bears a rational relationship to a legitimate end. *Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir.1998) (en banc). The classification the Coalition complains of is Union Electric's distinction between docks larger than 3000 square feet, which are subject to the annual fee, and docks 3000 square feet and smaller, which are subject to the one-time assessment of $400 or $250, depending on size. The expenses which Union Electric seeks to recoup include inspection expenses, and it is rational to expect that Union Electric would incur greater expenses in connection with larger structures and that owners of larger structures would enjoy greater benefits from being allowed to use project lands for their docks. The classification therefore passes the rational basis test.

V.

[13] The Coalition contends that FERC's refusal to assign its complaint to an administrative law judge for discovery and an evidentiary hearing violates the Coalition's right to due process and is contrary to 16 U.S.C. § 825f (2000).

***780** [14] Congress provided that FERC itself should prescribe its own hearing procedures:

> All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

16 U.S.C. 825g (2000). "[T]he formulation of administrative procedures is 'basically to be left within the discretion of the agencies.' " *Crete Carrier Corp. v. United States*, 577 F.2d 49, 50 (8th Cir.1978) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)).

FERC complaint procedures provide that cases can be decided on the pleadings. 18 C.F.R. § 385.206(g)(2) (2001). FERC stated in its original order: "Because we find it possible to assess the reasonableness of [Union Electric's] fees on the existing record, we will not assign the proceeding to an Administrative Law Judge for a formal evidentiary hearing, as the Coalition requests." 90 FERC 61, 249, 2000 WL 280769, at *8. In its disposition of the rehearing application, FERC rejected the Coalition's contention that its claim could only be clarified by discovery and a hearing: "While trial-type procedural measures may be used to develop a record and resolve issues of fact, they are not intended to be used as a cure for a complaint that fails to inform the Commission completely and clearly as to the issues and factual disputes that the complainant wishes the Commission to address." 93 FERC 61, 158, 2000 WL 1701202, at *3. The Coalition's complaint focused primarily

on the issue of whether FERC was authorized to allow the imposition of the user fees, which is a legal, not a factual, issue. The Coalition also alleged that the amount of fees was not reasonable; FERC concluded it was reasonable, because the fees generated were substantially less than Union Electric's expenses associated with allowing the docks to be constructed and maintained on project lands. The Coalition did not present FERC with any reason to doubt the accuracy of the information it received from Union Electric regarding its expenses. FERC's decision to deny a hearing on the ground that there were no material factual disputes was within its discretion and did not violate the Coalition's constitutional rights.

VI.

[15] Finally, the Coalition contends that FERC's determination was not supported by substantial evidence. In particular, the Coalition attacks FERC's conclusion that Union Electric's allowable expenses exceeded the fees generated. FERC's conclusion was based on Union Electric's August 16, 2000 submission detailing its expenditures for property management, permit processing, and enforcement; derelict dock removal; and lake survey. In 1999, those expenses totaled $1,228,344, whereas fees generated from the permit program totaled $615,000. The Coalition attacks the labor costs listed by Union Electric, which should have been decreased to show that the employees performed other duties that would not be attributable to shoreline management. However, FERC's brief demonstrates that, even reducing those labor costs to reflect time the Coalition contends was spent on other duties, Union Electric still has allowable labor costs of $534,099, which, with $58,413 in derelict ***781** dock removal costs, $28,965 for shoreline inspection, $18,424 for lake survey, and $79,685 for legal fees, would still exceed the fees generated.

FERC's factual finding was supported by substantial evidence.

We have reviewed the Coalition's various subsidiary arguments and conclude they do not merit individual discussion.

We deny review of the FERC order, and we grant Union Electric's motion to strike the Coalition's post-argument letter brief of November 16, 2001.

297 F.3d 771, Util. L. Rep. P 14,410

*1 Commission Opinions, Orders and Notices

Union Electric Company, d/b/a AmerenUE

Project No. 459-105

Order on Complaint

(Issued March 16, 2000)

Before Commissioners: James J. Hoecker, Chairman; William L. Massey, Linda Breathitt, and Curt H (acute)ebert, Jr.

On September 3, 1999, the Coalition for the Fair and Equitable Regulation of Docks on Lake of the Ozarks (Coalition) filed a complaint against Union Electric Company, doing business as AmerenUE (AmerenUE or licensee), a petition for issuance of a Declaratory Order, and a request for rehearing of an August 5, 1999 letter issued by the Director, Division of Licensing and Compliance (Director). The Coalition is a non-profit corporation comprising property owners affected by a permit program that has been instituted by AmerenUE, licensee of the Osage Project No. 459. AmerenUE filed an answer to and a motion to dismiss the complaint, and a protest to the petition for issuance of a declaratory order. The Coalition filed a response to the dismissal motion. As explained below, we are treating the three- pronged September 3 filing as a complaint and are denying it.

Background

On April 9, 1981, the Commission issued a new license to Union Electric Company for the Osage Project, located on the Osage River, in Benton, Camden, Miller, and Morgan

Counties, Missouri. [FN1] Among the project works are Bagnell Dam and a reservoir, known as Lake of the Ozarks, having a surface area of 55,342 acres.

Article 41 of the license provides, as pertinent, that the licensee shall have the authority to grant permission for certain types of non- project use and occupancy of project lands and waters without prior Commission approval, but that the licensee has continuing responsibility to supervise and control these uses and occupancies. Non-commercial piers, landings, and boat docks are among the types of use and occupancy authorized by Article 41. The article also provides that the licensee may establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program.

In 1998, AmerenUE, after notice and opportunity for public comment, instituted revisions to its permit program for shoreline structures. The revised program, which became effective January 1, 1999, provided for changes in permit requirements, structure and maintenance guidelines, permit fees, and annual fees. On January 22, 1999, AmerenUE requested that Commission staff issue an informal advisory opinion clarifying AmerenUE's shoreline management duties on the lake under Article 41. Specifically, AmerenUE sought confirmation that the Commission has authority to allow AmerenUE both to administer a permitting program for shoreline structures and to charge a reasonable fee to recover its costs in administering that program. AmerenUE explained that it was seeking this clarification because local residents owning land on the lake had formed the Coalition and were challenging the Commission's and AmerenUE's authority. On March 23, 1999, the Coalition submitted to the Commission a letter explaining its position that AmerenUE and the

Commission have no authority to impose a "user fee" on private and commercial dock owners on the lake. [FN2] The Coalition listed seven categories of expenses, totaling $1,130,000, for which it claimed AmerenUE was attempting to collect fees for shoreline management.

*2 By letter of April 6, 1999, the Director responded to AmerenUE's letter. The Director explained that the Commission's authority to allow licensees to establish a permitting program was derived from Section 10(a)(1) of the Federal Power Act (FPA), which provides that every hydroelectric project licensed by the Commission must serve both developmental and environmental resources, including recreation and shoreline protection. [FN3] However, the Director, referring to the March 23 Coalition letter, stated that some of the categories for which AmerenUE was attempting to charge fees did not appear to be related to the costs of administering the permit program. The Director asked AmerenUE to provide additional information regarding its permit administration responsibilities and shoreline management costs, including a breakdown of the costs associated with each of the categories for which AmerenUE was assessing fees, so that the Director could ensure that the fees charged for permits were consistent with the Commission's requirement that a licensee assess only a reasonable fee to cover its cost of administering a permit program.

By letter of May 6, 1999, AmerenUE responded to the Director. AmerenUE discussed the reasons for its permit system revisions, explained why it believes it has a legitimate grant of authority under its license to assess user fees on dock owners, and furnished information purporting to show that its fees are reasonable. [FN4] In a June 8, 1999 letter to the Commission, the Coalition responded that "reasonable costs of administering the permit program" should include only the

cost of processing the permit application and, if necessary, an on-site inspection, and contended that AmerenUE had still not provided sufficient supporting information about its costs to permit a determination of whether its fees are reasonable. By letter of June 23, 1999, AmerenUE submitted additional arguments in support of including certain categories of shoreline expenses in the assessments to lakeside property owners.

By letter of August 5, 1999, the Director concluded that the assessment of fees for several of AmerenUE's categories of expenses, specifically, property management, permit processing and enforcement, derelict dock removal, and monitoring and surveying, was consistent with the intent of Article 41 that a licensee be able to recover costs related to its dock permitting program. However, the Director determined that expenses for fish stocking, mosquito spraying, and adopt-a-shoreline programs were not directly related to the permit program and should not be supported by dock permit fees.

On September 3, 1999, the Coalition filed the pleading before us. The complaint, petition for declaratory order, and request for rehearing of the Director's Letter Order contain essentially the same contentions and requests for relief. The Coalition argues that the FPA does not empower the Commission to impose a tax or user fee of the kind involved here, or to delegate such a power to a private entity, and it argues that any such delegation would be unconstitutional. The Coalition also contends that Article 41 allows the licensee to recover only the cost of issuing the permit, not all of its shoreline management expenses, and that the fees imposed under the program, specifically, the annual charge to dock owners, based on a rate of $.045 per square foot, are in excess of the authority granted by Article 41 and are not reasonable. In addition, the Coalition asserts that the permit

program violates 33 U.S.C. § 565, which prohibits persons who have made improvements to navigable waterways from collecting tolls for such improvements; and the FPA, which prohibits the Commission and licensees from taking any action that is discriminatory or that interferes with the lawful property rights of owners of the project without compensation. The Coalition argues that the permit program rules and regulations governing boat dock placement interfere with established property rights, and are unreasonable, arbitrary, in excess of the authority granted under the license, and discriminatory in application. The Coalition requests that we make findings consistent with these arguments.

*3 The Coalition contends that the issues in the complaint cannot be decided without assignment of the proceeding to an Administrative Law Judge, and that a formal evidentiary hearing and discovery period is necessary due to AmerenUE's failure to supply information requested by the Director. Finally, the Coalition requests that the Commission grant "preliminary relief" by enjoining and restraining AmerenUE from imposing the fees and enforcing the 1999 permit program until the Commission has made a final determination regarding the validity and reasonableness of the program. [FN5]

The Coalition's filing of three separately titled pleadings in one document may reflect uncertainty as to the appropriate pleading for bringing these contentions to us for disposition. In any event, there is no need for us to entertain three pleadings requesting the same relief. The petition for declaratory order asserts that there is an actual controversy as to the authority of AmerenUE to implement the permit program and as to the reasonableness of the amount of the fees, and that the petitioners will be left uncertain as to their legal rights and duties if the Commission does not resolve the

controversy. However, addressing the issues in the complaint will resolve the controversy and terminate the uncertainty. The request for rehearing alleges error in a Director letter that was issued only in response to a request from the licensee for an informal advisory opinion. [FN6] Therefore, we believe that addressing only the complaint is the appropriate approach.

Discussion

It is not wholly clear to us whether the Coalition maintains that all permit programs and accompanying fees are unauthorized by the FPA and are otherwise impermissible. In any event, it clearly contends that the licensee's particular permit program, by imposing "user fees," goes beyond any authority that the Commission has granted, or could grant, to the licensee. We believe that the Coalition has not correctly assessed either the role of the FPA with respect to the development of waterways for hydropower and other public purposes or the nature of the licensee's action.

In passing the Federal Water Power Act of 1920, now Part I of the FPA, Congress intended to achieve "a comprehensive development of national resources." [FN7] Under Section 10(a)(1) of the FPA, the Commission is required to ensure that any project for which a license is issued will be best adapted to a comprehensive plan for improving or developing the waterway for a variety of beneficial uses, including the improvement and utilization of water power development and recreational purposes. Section 10(g) provides that licenses shall be subject to "[s]uch other conditions not inconsistent with the provisions of this Act as the Commission may require." By this section, Congress intended "to give to the Commission wide latitude and discretion in the performance of its licensing and regulatory functions." [FN8] In addition, Section 309 of the FPA authorizes the Commission "to

perform any and all acts, and to prescribe . such orders . as it may find necessary or appropriate to carry out the provisions of [the Act]." As the court of appeals stated in Niagara Mohawk Power Corp. v. Federal Power Commission, [FN9]

*4 The Act is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is one that entrusts a broad subject- matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines.

Section 3(11) of the FPA defines "project" as a "complete unit of improvement or development," including not only dams and powerhouses but also "all storage, diverting, or forebay reservoirs connected therewith," and Section 3(12) defines "project works" as "the physical structures of a project." It is clear that Congress intended reservoirs used for the production of hydroelectric power to be part of a hydropower project and therefore within the jurisdiction of the Commission.

Because a reservoir impounded by a project dam is part of the project and is a licensed project work, the Commission has not only the authority but the obligation to ensure that any uses of the reservoir will be consistent with the beneficial public purposes for which a license has been issued. [FN10] The Commission can, and does, require the licensee to acquire and retain all necessary ownership of or rights to project property, including project reservoirs. [FN11] Further, the Commission may direct a licensee to take measures regulating use of the reservoir for non-power purposes, and the Commission may authorize licensees to dispose of project property or permit its use for non-project purposes by granting applications to amend the license. [FN12]

In the case of the Osage Project, the Lake of the Ozarks is the reservoir impounded by the project's Bagnell Dam. Pursuant to Article 5 of the Osage Project license, the licensee holds property interests in the lands on which the reservoir is located. These ownership rights extend at least to the high water mark of the reservoir, which is at all places at least 660 feet mean sea level but frequently exceeds that level. [FN13] The license contains articles, which are standard in all licenses, that specify the conditions under which project property, including the reservoir, may be made available for other uses. Thus, for example, Article 13 of the license directs the licensee, on application of any person, to permit such reasonable use of its reservoir as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway and the conservation and utilization of the water resources of the region for water supply or other municipal and industrial uses. [FN14] Article 18 requires the licensee to allow free public access, to a reasonable extent, to project waters for navigation and for outdoor recreational purposes, so far as is consistent with proper operation of the project; Article 18 also allows the licensee to reserve from public access such portions of the project waters and adjacent lands as may be necessary for the protection of life, health, and property. And Article 41, the article in question here, gives the licensee authority to grant permission for certain types of use and occupancy of project waters, and to convey certain interests in those waters, without prior Commission approval. Implicit in all of these articles is the understanding that permission for these uses may be withheld if the uses would interfere with other project purposes, contrary to the public interest. The underlying authority to regulate these uses is inherent in Congress's grant to the Commission of the responsibility for ensuring that the project be used for the beneficial public purposes specified in Section 10(a)(1).

*5 Because recreation is one of the specified public purposes of a project, the Commission has encouraged recreational use of project property if such use is consistent with other project purposes. The Commission has also long recognized that the use of project property for recreational purposes will likely cause a licensee to incur expenses that, in fairness, it should be able to recover. As a reflection of this policy, the Commission, since 1965, [FN15] has maintained recreational development regulations, at 18 C.F.R. § 2.7 (1999), which encourage the development of recreational facilities at licensed projects but provide that:

The Commission will not object to licensees and operators of recreational facilities within the boundaries of a project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating, and maintaining such facilities.

A similar policy has long been in effect with regard to situations in which a licensee, with the Commission's acquiescence, grants permission to other entities to place non-project structures, facilities, or other physical items on project property for recreational or other purposes. This policy was reflected in early license articles providing for public access to project property. For example, in Yadkin, Inc., 14 FERC P 61,303 (1981), the Commission addressed a challenge to the licensee's pier fees imposed under Article 7 of the license, issued in 1957, which provided, as pertinent here:

As far as is consistent with proper operation of the project, the licensee . shall allow to a reasonable extent for such [navigation and recreational] purposes the construction of access roads, wharves, landings, and other facilities on its lands the occupancy of which may in appropriate

circumstances be subject to payment of rent to the licensee in a reasonable amount.

The Commission found that the licensee's provision of services that included inspection of piers and the removal of abandoned piers and rubbish enhanced the recreational resources of the project and the use of those resources, and, therefore, formed a reasonable basis to require a pier permit fee.

Article 41 of the Osage Project license is a standard land use article that the Commission adopted in Brazos River Authority, 11 FERC P 61,162 (1980). This standard article was intended to provide licensees with substantial additional authority to allow changes in the use of project lands and waters and conveyance of interests in project lands. The principle that licensees should be able to recover reasonable costs related to permitting the use and occupancy of project lands and waters for facilities constructed and maintained by other entities was carried over into this standard article. Therefore, the Commission's discussion in Yadkin, although directed toward a different license article, remains applicable to the present proceeding.

The Coalition contends that fees assessed by AmerenUE's permit program are a tax or user fee, which this Commission has no authority to impose and, therefore, no authority to delegate to a private entity. The Coalition treats the terms "tax" and "user fee" as interchangeable and as equally impermissible. Taxation is indeed a legislative function, which, as the Coalition asserts, has not been delegated by Congress to this Commission. However, as the United States Supreme Court has determined, a fee is not a tax: [FN16]

***6** A fee . is incident to a voluntary act, e. g., a request that a public agency permit an applicant to practice law or medicine

or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. A "fee" connotes a "benefit".

Since the Commission has the authority to regulate, through its licensee, uses of project property, even to the extent of prohibiting them, it follows that the Commission may authorize the licensee to permit such uses to an extent determined by the Commission. Any permission from the licensee to use project property constitutes a benefit for which a fee may properly be charged. Here, the property owners whose boat docks extend into the reservoir receive a benefit from the use of the project impoundment that would be within the authority of the Commission and its licensee to withhold. The licensee's efforts to recover costs incurred in connection with a permit program that grants these benefits do not constitute imposition of a tax. The licensee is not taxing the private property of the dock owners but imposing a fee for allowing the dock owners to extend their facilities onto project property.

The Coalition argues that the permit program violates 33 U.S.C. § 565, which authorizes persons, at their own risk and expense, to improve navigable waterways, but prohibits the collection of tolls by reason of such improvement. [FN17] AmerenUE's assessments do not violate this statutory provision. The assessed fees are intended to cover the costs of a permitting program for boat docks and other structures within the project impoundment; they do not impose a toll for the use of the river.

The Coalition asserts that the permit program violates the FPA, which prohibits actions that are discriminatory or that interfere with the lawful property rights of the owners of the

project without compensation. The Coalition does not identify the provisions of the FPA to which it alludes. In any event, it does not explain why the program is discriminatory. The Coalition's assertion that the permit program interferes with the project owner's property rights is inapposite, since AmerenUE itself is the project owner. If, as we must assume, the Coalition intended to assert that the permit program may not interfere with property rights of dock owners, we agree. However, a program for issuing permits subject to a reasonable fee does not interfere with dock owner's property rights. The permit program does not assess property owners for structures placed on their own property but for the privilege of extending their structures into the Lake of the Ozarks, which is project property.

The Coalition asserts that Article 41 grants limited authority to the licensee to recover only the cost of issuing the permits, not to recover all of its shoreline management expenses, and, further, authorizes recovery of only "reasonable" amounts. The Coalition argues that AmerenUE's assessments under the revised permit program exceed these limits.

*7 Article 41 authorizes assessment of "a reasonable fee to cover the licensee's cost of administering the permit program." As noted, the Director determined that the expenses for fish stocking, mosquito spraying, and adopt-a-shoreline programs were not directly related to the permit program and should not be supported by the permit fees. We agree and see no need to consider these categories further. The remaining categories under which AmerenUE assesses fees under the program are property management, permit processing, and enforcement; derelict dock removal; and lake survey. The Director found that these types of expenses were contemplated by Article 41.

We agree that it is reasonable for AmerenUE to assess fees

for these types of expenses under the program. The Coalition's position that Article 41 limits fees to the cost of issuing the permits is too restrictive. Article 41 clearly authorizes collection of fees for costs of "administering" the program. This does not contemplate simply the processing of applications. Article 41(a) requires the licensee of the project to ensure that the uses it permits are "consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project" and places on the licensee "continuing responsibility to supervise and control the uses and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed." Further, "[i]f a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation," including "if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non- complying structures and facilities." Article 41(b) also requires the licensee to "ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable State and local health and safety requirements."

In the response to the complaint, AmerenUE explains that it incurs substantial costs each year in order to comply with its obligation to regulate water structures under its license. AmerenUE specifies that its expenses under the category "property management, permit processing and enforcement" consist almost entirely of labor costs and legal fees. Regulation of water structures at the Lake of the Ozarks

requires the services of eight full-time employees and the part-time service of several other employees. In the past, AmerenUE has also incurred legal fees to enforce compliance with its permit program, and it estimates that, at any given time, it is engaged in between 20 and 25 suits arising out of permit violations. Often it must bring suit to compel a dock owner with dangerous, dilapidated, or excessively large facilities to comply with permit terms. The expenses associated with labor, legal costs, and derelict dock removal are certainly related to AmerenUE's responsibilities under the license to monitor the permitted uses, protect the environmental values of the project, and ensure proper maintenance of the permitted structures.

***8** The labor, legal, and derelict dock removal expenses constitute $895,000 of the $945,000 in total expenses that AmerenUE projected for 1999 in its response to the complaint. [FN18] AmerenUE did not provide a further breakdown of the expenses in these categories. However, it states that it expects to receive $440,000 in annual use fees and $175,000 in permit processing fees during 1999. Thus, the projected fees would cover only $615,000 of the expenses AmerenUE expects to have incurred during 1999 for the administration of the permit program. AmerenUE indicates that its actual expenses under these categories for the previous two years were even higher than its projected 1999 expenses, which suggests that AmerenUE's projections are realistic. Since assessment of the fees under the permit program would still leave AmerenUE to carry the financial burden of a significant portion of its legitimate expenses in administering the program, we are not persuaded that the fees are excessive or unreasonable.

The record shows that AmerenUE's permit program imposes an annual use fee of 4.5 cents per square foot for docks occupying more than 3,000 square feet, a one-time fee of

$400 for docks occupying between 1,800 and 3,000 square feet, and a one-time fee of $250 for docks occupying less than 1,800 square feet. Without being completely clear on the matter, the Coalition's complaint that the licensee's fees are unauthorized and unreasonable appears to be restricted to the 4.5-cents-per- square-foot annual use fee. While the complaint itself does not explain why the Coalition considers this particular fee unreasonable, previous submissions by the Coalition suggest that the Coalition believes that this fee cannot be regarded as a permit fee because it is an annual user fee rather than a one-time permit- processing fee. [FN19] We do not regard this distinction as relevant. The fact that a fee may be imposed annually does not prevent it from being a reasonable fee that covers only the costs of administering the permit program, since those costs are not restricted to one- time permit issuance costs but may include continuing enforcement and related costs, as discussed above. [FN20]

Because we find it possible to assess the reasonableness of AmerenUE's fees on the existing record, we will not assign the proceeding to an Administrative Law Judge for a formal evidentiary hearing, as the Coalition requests.

One further clarification is necessary. As we have discussed, Article 41 of the Osage Project license is a form of the standard land use article that the Commission adopted as a successor to earlier, less extensive, land use articles. In granting licensees this substantial additional authority to allow changes in the use of project lands and waters, the Commission sought to reduce the administrative burden of processing numerous filings seeking Commission approval of routine, inconsequential matters. In addition to the Subsection (b) provisions for granting permission for use and occupancy, the article, in Subsections (c) and (d), provides for the conveyance of various interests in project property,

without prior Commission approval, subject to certain filing and notification conditions.

*9 The article was intended to expand, not restrict, licensee's authority. As such, it should be construed as continuing the policy of allowing a licensee to collect reasonable fees related to granting permission for the use of project property. Nevertheless, provisions for the licensee to establish a program for issuing permits for use and occupancy, subject to the payment of a reasonable fee, are included only in Subsection (b) of the article and apply only to "landscape plantings," "non-commercial piers, landings, boat docks, or similar structures and facilities," [FN21] and "embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline." It is clear from the record in this proceeding that not all of the boat docks covered by the licensee's permit program fall within the description in this subsection. [FN22]

This fact does not cause us to alter our conclusions regarding AmerenUE's permit program. The policy underlying a licensee's authority to grant permission for uses of project property, and to assess reasonable fees for related costs, is derived from the licensee's responsibilities to carry out project purposes in accordance with Section 10(a)(1) of the FPA and predates the standard land use article included in the Osage Project license. The standard land use article was meant to reflect that policy, not to create additional restrictions on the ability of licensees to grant permission to use and occupy project works. It is logical, moreover, that a licensee might wish to create one permit program for all boat docks and similar facilities that occupy project lands and waters, since the obligations and expenses of monitoring these uses, enforcing permit terms, and removing non-complying or unauthorized uses are a benefit to the lake as a recreational resource that is shared by all boat dock owners.

Therefore, Subsection (b) of the article should not be construed as establishing limitations on the types of uses that may be authorized by issuing permits. [FN23] At the same time, we would view the limitations on the fees that may be assessed under a permit program as applicable to all uses covered by the program, not simply to those specified in Subsection (b). [FN24]

In light of our action here, we will dismiss as moot the Coalition's request for preliminary relief and AmerenUE's motion to dismiss the complaint.

The Commission orders:

The complaint filed September 3, 1999, by the Coalition for the Fair and Equitable Regulation of Docks on Lake of the Ozarks is denied.

FN1 15 FERC P 62,038. The project was originally licensed in 1926 and has been in operation since 1931. See the Federal Power Commission's 6th Annual Report 243 (issued to Walter Cravens).

FN2 This submission did not refer to AmerenUE's request for an advisory opinion or seek any particular Commission action.

FN3 By way of response to AmerenUE's request, the Director attached an earlier letter from the Director of the Office of External Affairs to Senators Ashcroft and Bond of Missouri. The Senators had forwarded to the Commission for response several questions from a constituent regarding the nature of the permitting authority.

FN4 AmerenUE also stated that it had filed suit against the Coalition and other defendants in the United States

District Court for the Western District of Missouri to obtain an order declaring that the Commission and AmerenUE have the authority to regulate the construction and maintenance of docks and other structures in the Lake of the Ozarks and to impose fees to recover reasonable costs. On October 13, 1999, upon a motion filed by AmerenUE, the court dismissed the action without prejudice, on the basis that all disputes between the parties to the proceeding were pending before this Commission.

FN5 The Coalition states that AmerenUE has started billing individuals for the 1999 permit program, and that if preliminary relief were denied, the Coalition's members would be forced to make substantial payments under a program that may be found invalid, since AmerenUE has indicated that it would call collection agencies or revoke dock permits if fees are delinquent.

FN The Coalition also filed a petition for waiver of filing fee pursuant to 18 C.F.R. § 381.106 and for exemption in lieu of a fee pursuant to 18 C.F.R. § 381.302. Section 381.302 of the Commission's regulations provides for the payment of a fee for filing petitions for issuance of a Declaratory Order but excludes petitions that pertain to Part I of the FPA. Since the Coalition is not required to pay a fee, we will dismiss its petition as moot.

FN6 In the request for rehearing, the Coalition contends that the Director's August 5 letter fails to address "each and every attack" that the Coalition had presented to the Commission regarding the Commission's and AmerenUE's authority with respect to the permit program; does not address the reasonableness of the amount of the fees sought to be recovered by AmerenUE; and errs in partially confirming AmerenUE's authority to implement the permit program under Article 41 of the license. Although the

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Director considered the unsolicited submissions of the Coalition, he was not obligated to consider every argument advanced by the Coalition or the reasonableness of the amount of the fees, since he was responding to a request for clarification by the licensee. In any event, pursuant to Section 313(a) of the FPA, requests for rehearing are deemed denied if not acted on within 30 days of their filing. While the Commission often issues notices granting rehearing for the purpose of further consideration within that 30-day period in order to toll the statutory deadline, no such notice was issued here, and the request for rehearing has therefore been denied by operation of law.

FN7 First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 180- 81 (1946).

FN8 Metropolitan Edison Co. v. FPC, 169 F.2d 719, 723 (3d Cir. 1948).

FN9 379 F.2d 153 at 158 (D.C. Cir. 1967).

FN10 See, e.g., Alabama Power Co., 74 FERC P 61,157 (1996).

FN11 This is accomplished through standard Article 5 of each license, which requires licensees to acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. Furthermore, the licensee or its successors and assigns must retain possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use.

FN12 See Entergy Corp., 80 FERC P 61,266, at pp.

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61,962-63 (1997).

FN13 The extent of the project boundary is indicated on maps on file with the Commission as Exhibit K to the license application.

FN14 This is commonly referred to as the "joint use" article. See Entergy Corp., supra, 80 FERC at p. 61,964.

FN15 Order No. 313, Recreational Development at Licensed Projects, 34 FPC 1546.

FN16 National Cable Television Assn. v. U.S., 415 U.S. 336 at 340-41 (1974).

FN17 The entire provision reads:

Any person or persons, corporations, municipal or private, who desire to improve any navigable river, or any part thereof, at their own expense and risk may do so upon the approval of the plans and specifications of said proposed improvements by the Secretary of the Army and Chief of Engineers of the Army. The plan of said improvement must conform with the general plan of the Government improvements, must not impede navigation, and no toll shall be imposed on account thereof, and said improvement shall at all times be under the control and supervision of the Secretary of the Army and Chief of Engineers.

Section 565 was enacted as part of the Rivers and Harbors Appropriation Act of 1902, before Congress passed the Federal Water Power Act as a comprehensive system for licensing and administering private hydropower projects on the nation's waterways. As the U.S. Supreme Court stated in First Iowa, supra, n.7, the "complete scheme of national regulation" that the Water Power Act was to initiate was

intended to replace "the piecemeal, restrictive, negative approach of the River and Harbors Acts and other federal laws previously enacted." 328 U.S. 152 at 180.

FN18 AmerenUE also specifies lake survey expenses of $20,000 and other expenses of $30,000.

FN19 In its March 23, 1999 letter to Commission staff, the Coalition argued (at p. 5) that "the attempt to impose an annual user fee on private and commercial owners of docks of 3,000 square feet or more constitutes a tax that is in excess of the authority granted by Article 41." We also note that, in the constituent letter forwarded by the Missouri Senators to the Commission, as referred to in n.3, supra, the constituent questioned the Commission's authority to delegate to a licensee the right to assess annual fees in addition to permit processing fees.

FN20 Since the filing of this complaint, several letters from dock owners have been submitted or forwarded to the Commission. Some of these letters allege that the licensee's fee structure is unreasonable in favoring certain classes of dock owners over others. However, the Coalition's complaint, while challenging the legitimacy and reasonableness of the licensee's fees, does not present any argument that the fee structure itself is unreasonable or discriminatory. In its response to the complaint, AmerenUE explains that docks in excess of 3,000 square feet are typically either used for commercial purposes-such as marinas with multiple boat slips, part of a restaurant, or part of a recreation facility-or are part of a residential development that provides water access to a large number of people. AmerenUE justifies the assessment of a greater fee for these larger docks on the basis that they receive greater benefits and impose more inspection costs than smaller docks. In the absence of any argument in the complaint on this issue, we have no reason to conclude

that the licensee's establishment of a permit fee structure on the basis of this rationale is unreasonable or discriminatory.

FN21 Later versions of the article add the restrictive phrase "that can accommodate no more than 10 watercraft at a time and where said facility is intended to serve single-family dwellings."

FN22 Under Subsection (d) of the article, the licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina. A licensee must request specific approval from the Commission to grant permission to use and occupy, or to convey an interest in, project property for all boat docks and marinas that do not fall within the descriptions in Subsections (b) and (d).

FN23 However, the issuance of permits for uses not encompassed by the article would require prior Commission approval.

FN24 Our conclusion that a permit program may embrace these more extensive uses should not be construed as implying that the Commission favors permit issuance over the conveyance of property interests for these uses.

Federal Energy Regulatory Commission

90 FERC P 61,249, 2000 WL 280769 (F.E.R.C.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1071

The Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks,	*	
Petitioner,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	*	
Federal Energy Regulatory Commission,	*	
Respondent,	*	
Union Electric Company, doing business as AmerenUE,	*	
Intervenor - Intervenor on Appeal.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

October 17, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 12--FEDERAL REGULATION AND DEVELOPMENT OF POWER
SUBCHAPTER III--LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS

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Current through P.L. 107-377 (excluding P.L. 107-296, 107-314,
107-347, 107-372) approved 12-19-02

§ 825l. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of

appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the

Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 12--FEDERAL REGULATION AND DEVELOPMENT OF POWER
SUBCHAPTER I--REGULATION OF THE DEVELOPMENT OF WATER POWER AND RESOURCES

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Current through P.L. 107-377 (excluding P.L. 107-296, 107-314,
107-347, 107-372) approved 12-19-02

§ 797. General powers of Commission

The Commission is authorized and empowered--

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water- power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain

such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, that upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 12--FEDERAL REGULATION AND DEVELOPMENT OF POWER
SUBCHAPTER III--LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS

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Current through P.L. 107-377 (excluding P.L. 107-296, 107-314,
107-347, 107-372) approved 12-19-02

§ 825f. Investigations by Commission

(a) Scope

The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) Attendance of witnesses and production of documents

For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) Resort to courts of United States for failure to obey subpena; punishment

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing

business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Testimony by deposition

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(e) Deposition of witness in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(f) Deposition fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

31 U.S.C. §9701. - Fees and charges for Government services and things of value

(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be -

(1) fair; and

(2) based on –

(A) costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts.

(c) This section does not affect a law of the United States -

(1) prohibiting the determination and collection of charges and the disposition of those charges; and

(2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases

UNITED STATES CODE ANNOTATED
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 12--RIVER AND HARBOR IMPROVEMENTS GENERALLY
SUBCHAPTER I--GENERAL PROVISIONS

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107-347, 107-372) approved 12-19-02

§ 565. River and harbor improvement by private or municipal enterprise

Any person or persons, corporations, municipal or private, who desire to improve any navigable river, or any part thereof, at their or its own expense and risk may do so upon the approval of the plans and specifications of said proposed improvement by the Secretary of the Army and Chief of Engineers of the Army. The plan of said improvement must conform with the general plan of the Government improvements, must not impede navigation, and no toll shall be imposed on account thereof, and said improvement shall at all times be under the control and supervision of the Secretary of the Army and Chief of Engineers.